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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 C.S., by and through his Conservator,) CASE NO.: 08 CV 0226 W (AJB)
13 MARY STRUBLE, on behalf of himself) PLAINTIFF'S MEMORANDUM OF
and all others similarly situated,) POINTS AND AUTHORITIES IN
14) REPLY TO DEFENDANTS'
15 Plaintiff,) CALIFORNIA DEPARTMENT OF
16 v.) EDUCATION AND OFFICE OF
17) ADMINISTRATIVE HEARINGS'
18) OPPOSITIONS RECONSIDERATIO
Defendant.) OF PLAINTIFF'S APPLICATION
19) FOR TEMPORARY RESTRAINING
19) ORDER
19) Date: June 2, 2008
19) Judge: Hon. Thomas J. Whelan

1. **I.**2. **UPDATED PROCEDURAL HISTORY**3. On May 12, 2008, this honorable Court issued an Order Setting Briefing
4. Schedule For Plaintiff's Motion For Reconsideration.5. On May 23, 2008 Defendant's California Department of Education ("CDE")
6. and California Office Of Administrative Hearings, Special Education Division
7. ("OAH") submitted their respective Oppositions to Motion For Reconsideration.
8. Plaintiff, C.S. hereby respectfully submits its Reply to the Oppositions.9. **II.**10. **BACKGROUND**11. On February 5, 2008, Plaintiff, as class representative, commenced this
12. action for a Permanent Injunction enjoining California Department of Education
13. ("CDE") from contracting with Office of Administrative Hearings, Special
14. Education Division ("OAH") for the provision of Mediation and Due Process
15. Hearings, pursuant to Individuals With Disabilities Education Act "IDEA", 20
16. U.S.C. § 1400, et seq. to special education students and their parents throughout
17. the State of California. IDEA, and related regulations (34 C.F.R § 300.00 et seq.,
18. were specifically enacted to provide equal protection to appropriate educational
19. programs to disabled students, and provide procedural and substantive mandates
20. which states must follow in order to receive federal funding for special education.21. Congress passed the Education of the Handicapped Act ("EHA") provided
22. the foundation for establishing the right of children with disabilities to a free,
23. appropriate public education in the least restrictive environment by interpreting the
24. equal protection guarantee of the 14th Amendment.25. The mandate for EHA's successor, IDEA arose after the landmark decision
26. of *Brown v. Board of Education*, 347 U.S. 483 (1954), when Congress learned that
27. a free appropriate public education which emphasizes special education and related
28. services designed to meet their unique needs, "and to assure that the rights of

1 handicapped children and their parents or guardians are protected 20 U.S.C. §
 2 1400(B)(3). In *Brown v. Board of Education*, the need for education equality was
 3 considered to be “perhaps the most important function of state and local
 4 governments.” *Id.* In responding to the problems and disparities in states’
 5 educational systems for disabled students, “Congress did not content itself with the
 6 passage of a simple funding statute. Rather, the EHA confers upon disabled
 7 students an enforceable substantive right to public education in participating States
 8 *Honig v. Doe*, 484 U.S. 305, 311, citing, *Board of Education of Henrick Hudson*
 9 *Central District v. Rowley*, 458 U.S. 176 (1982).the interpretation by Congress in
 10 two related District Court decisions, *Pennsylvania Association for Retarded*
 11 *Children (PARC) v. Pennsylvania* (343 F. Supp. 279 (PA 1972), and *Mills v. Board*
 12 *of Education*, 348 F. Supp. 866 (DC 1972). The goals of IDEA were (1) to assure
 13 that all children with disabilities receive a free appropriate public education that
 14 emphasizes special education and related services designed to meet their unique
 15 needs, (2) to protect the rights of children with disabilities and their parents and
 16 guardians, and (3) to assist the states in providing for the effective education of all
 17 children with disabilities. Federal funds are used to enable the states to comply
 18 with the mandate of IDEA.

19 While the Equal Protection Clause of the 14th Amendment is usually looking
 20 at questions pertaining to “suspect” or “protected” classes of citizens to determine
 21 whether a statute affecting such a class of citizens should be given, “strict scrutiny”
 22 or “rational basis”. However, in enacting the IDEA, and supporting regulations,
 23 Congress gave the class composed of “disabled students and their parents” their
 24 own protective legislation, the purpose of which, as stated by Justice Brennan in
 25 *Honig* “is [to] establish procedural safeguards designed to ensure parental
 26 participation in decisions concerning their disabled children and to provide
 27 administrative and judicial review of any decisions with which the parents
 28 disagree.” *Id.* at 305.

In holding that Congress, in enacting 20 U.S.C. § 1415(e)(3)'s, automatic "stay put" injunction the Act's drafters did not make any exception in 1415(e)(3) for any emergency exception for dangerous students, the U.S. Supreme Court stated that, we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create." *Honig*, 484 U.S. at 325.

IDEA is to be strictly construed as enacted, and was enacted to ensure the equal educational rights to a class consisting of special education students and their parents.

III.

ARGUMENT

1. The IDEA and Related Regulations Are To Be Enforced As Enacted.

Under IDEA Part B sections, which, are among the federal funding requirements, as well as 20 U.S.C § 1415(g)(2) OAH must:

Upon completion of the due process hearing, the Administrative Law Judge shall prepare a written, reasoned decision. The decision shall include reason(s) for any nonpublic school placement or agency services or reimbursement for any nonpublic school placement or agency services. The decision shall be mailed to all parties within 45 days from receipt of the request for a hearing.

Additionally, 34 C.F.R. 300.515(a) mandates: The public agency must ensure that not later than 45 days after the expiration of the 30 day [resolution] period under 34 C.F.R. 300.510(b), or the adjusted time periods described in 34 C.F.R. 300.510(c):

- A final decision is reached in the hearing; and
- A copy of the decision is mailed to each of the parties.

1 California Education Code §56505(f)(3) parallels this mandate in stating,
 2 “the written decision shall be mailed ‘no later than 45 days after the expiration of
 3 the 30-day [resolution] period pursuant to subdivision (c) of Section 56501.5.

4 Courts generally find that the use of the words “shall” and “must” imposes a
 5 mandatory, not a discretionary duty of compliance. *U.S. v. Chavez*, 627 F. 2d 953
 6 (9th Cir. 1980); *U.S. v. Kaluna*, 152 F. 3d 1069 (9th Cir. 1998) and 192 F. 3d 1188
 7 9th Cir. 1999§; *Doggett v. U.S.*, 875 F. 2d 684 (9th Cir. 1999).

8 The existence of the Stipulation To Extend Time for Decision (Ex. 6 to
 9 Declaration of Ellen Dowd in Support in Reply to Opposition for TRO) is a clear
 10 violation of the IDEA mandate, and the new evidence, consisting of a response to a
 11 public records act request, that there may be “potential production of a huge
 12 volume of material” in response to Plaintiff’s request for copies of all stipulations
 13 like the Stipulation To Extend Time for Decision (Ex. E to Declaration of Ellen
 14 Dowd in Support of Motion for Reconsideration of Application for TRO),
 15 indicates that the violation of the mandate of the 45-day timeline may be
 16 systematic.

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18 **2. The New Evidence Supports Issuance of the TRO, as This May**
Forestall the Revocation of Federal Funding For Special Education.

19 If, as Defendants argue, the 45-day timeline is a mere “goal” to aim for
 20 (which, Defendants concede has not ever been met by OAH), why, in response to
 21 OSEP’s 2/2/07 directive to CDE and OAH that they must comply with the 45-day
 22 rule to ensure continued federal funding (Ex. 4, p. 15 to Declaration of Ellen Dowd
 23 in Support in Reply to Opposition for TRO), did CDE deliberately on 2/1/08 in its
 24 State Annual performance report state to OSEP that “100 percent compliance of
 25 due process hearing requests were fully adjudicated within the 45-day timeline or a
 26 timeline that was properly extended by the hearing officer at the request of either

1 party.” (Ex. 5, p. 4 to Declaration of Ellen Dowd in Support in Reply to Opposition
 2 for TRO).

3 While CDE is arguing with regard to the TRO that the 45-day timeline is
 4 merely “guidance,” why didn’t CDE make this same argument to OSEP, instead of
 5 alleging that there was already 100% compliance. OSEP put CDE and OAH on
 6 notice on 2/2/07, and CDE, to obtain continued funding told OSEP what it wanted
 7 to hear on 2/1/08. While no one knows when or if OSEP pulls all of the federal
 8 funding as a result of CDE and OAH’s actual non-compliance with the 45-day
 9 mandate, it would be tragic to review this in hindsight when the opportunity to
 10 enforce a federally-protected educational program statute was applied for to the
 11 Court, and denied.

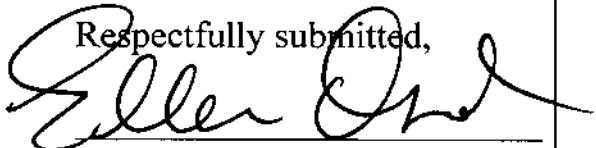
12 California’s special education students and their parents expect and deserve
 13 better. Just because these students reside in California and may enjoy state rights,
 14 doesn’t justify depriving them of their federal rights.

16 **IV.**

17 **CONCLUSION**

18 Through discovery, Plaintiff will obtain supplemental proof of its claims
 19 against Defendants. However, in order to maintain the status quo, and to avoid
 20 loss of funding do to OAH’s and CDE’s actions, which would be extremely
 21 harmful to special education students, foregoing, Plaintiff’s Application for TRO
 22 should be granted, and should be issued immediately.

23 Dated: May 28, 2008

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 25 Respectfully submitted,
 26 Ellen Dowd, Attorney for
 27 Plaintiff, C.S.